# Direct Investigation Assessments

## Food and Environmental Hygiene Department ("FEHD")

**Case No. OMB/DI/173**
**Enforcement against Unauthorised Extension of Business Areas by Licensed Restaurants**
**(Assessment commenced on 17 April 2007 and completed on 8 September 2008)**

Unauthorised extension of business areas by restaurants, causing obstruction, poor hygiene and other nuisance, has been a consistent theme of complaints received by FEHD. Such complaints surged by 44% in 2006/07 against the 26% increase in 2005/06.

## Major Statutory Provisions

2. FEHD may invoke against unauthorised extension of business areas by licensed restaurants under three major statutory provisions:

| Provision | Offence | Applicable to |
|---|---|---|
| Provision 1 – Food Business Regulation, Cap. 132X, Section 34C | Carrying on food business at any place beyond the confines of the food premises | Restaurant licensee |
| Provision 2 – Food Business Regulation, Cap. 132X, Section 31(1)(b) | Carrying on unlicensed restaurant business | Any person |
| Provision 3 – Summary Offences Ordinance, Cap. 228, Section 4A | Obstruction of public places | Any person |

3. Only provision 1 may result in suspension or cancellation of licence and has a strong deterrent effect. However, it can be enforced only against the restaurant licensee. In the absence of sufficient evidence implicating the licensee, provisions 2 and 3 will be invoked. Of the prosecutions instituted during the three years up to 2006/07, less than 18% invoked provision 1.

4. To strengthen the deterrent effect, FEHD plans to introduce legislative amendment to render not just the licensee of a restaurant but also its directors, managers and employees liable under provision 1.

## Suggestions

5. In this light, The Ombudsman has decided not to go for a full-fledged direct investigation but to continue to monitor developments. Nevertheless, FEHD should step up enforcement within the existing legislative framework by reviewing its prosecution policy for more rigorous action; improving the internal cooperation between different

streams of officers with enforcement responsibilities; and enhancing its computer database to generate analytical prosecution statistics more readily.

6. FEHD has accepted all our suggestions.

## Office of the Telecommunications Authority ("OFTA")

**Case No. OMB/DI/181**
**Procedures for Reporting Breach of the Unsolicited Electronic Messages Ordinance**
**(Assessment commenced on 25 March 2008 and completed on 7 July 2008)**

### Background – the Report Form

Under the Unsolicited Electronic Messages Ordinance ("UEMO"), recipients of unsolicited commercial electronic messages ("CEMs"), commonly dubbed "junk messages", can choose to unsubscribe. If they continue to receive such CEMs, they may complain to OFTA by completing a report form.

2. This Office noted that a complainant had to complete a separate form for each and every junk message. This meant repeating personal data and consent for disclosure where multiple messages were reported. The form also asked complainants for more details than were essential, e.g. a detailed description as well as the full text of the junk message.

3. Moreover, although OFTA's reporting procedures included alternatives, e.g. by telephone or in person, to cater for persons who have difficulty in writing, OFTA had not publicised those options.

4. Concerned that the public might be deterred from reporting junk messages, The Ombudsman initiated an inquiry.

### OFTA Review and Revision

5. In response, OFTA instantly reviewed and revised the report form so that a complainant can use the same form for reporting multiple CEMs. Furthermore, complainants of non-fax CEMs have to provide only a brief description of the CEM, while complainants of fax CEMs need not describe the CEM at all.

6. OFTA now also publicises its procedures for receiving non-written reports and accepts letter as an alternative to the report form.

### Our Comments

7. We appreciate the need for obtaining detailed information for processing cases of contravention of UEMO. However, this has to

be balanced against ease and convenience for the reporting public. Otherwise, the process becomes a chore and may deter reporting.

8. In this connection, The Ombudsman commends OFTA's prompt improvement in response to our inquiry and sees no need for a full-fledged direct investigation.

## Privacy Commissioner for Personal Data ("PCPD")

**Case No. OMB/DI/179**
**Arrangements for Notifying Complainants of Refusal to Investigate**
**(Assessment commenced on 14 January 2008 and completed on 31 March 2009)**

### Background

Section 39(3) of the Personal Data (Privacy) Ordinance, Cap. 486 provides that where PCPD refuses to carry out or continue the investigation of a complaint, he should notify the complainant in writing not later than 45 days after receipt of the complaint. Concerned that PCPD had failed to meet the 45-day rule in many cases, The Ombudsman initiated a direct investigation assessment on the subject.



### Consequences of Non-compliance

2. Despite mechanisms for monitoring progress, PCPD failed to comply with the 45-day rule in about 37% of cases between 2001 and 2007. This was due largely to PCPD's staff constraint and the inability of many complainants to provide all relevant information early. Though such non-compliance would not nullify PCPD's decision on a complaint case or deprive the right of the relevant parties to apply for a judicial review or to appeal to the Administrative Appeals Board, it constituted a delay in service delivery to the public.

### Remedial Measures

3. PCPD had long been aware of this problem. As early as July 1998, PCPD had drawn up a legislative proposal to extend the 45-day timeline to accommodate late provision of information by complainants, but no time slot could be found for tabling it before the Legislative Council. In 2006, PCPD proposed to the Constitutional and Mainland Affairs Bureau ("CMAB"), the policy bureau concerned, that he be given power to discontinue an ongoing investigation at any time if he had reasonable cause for so doing. PCPD considered there to be an anomaly under the existing section 39(3): once an investigation had started and the 45-day period had expired, he had to go on regardless of any change of circumstances which might render the investigation unnecessary.

## Observations and Conclusion

4. Although the legal consequences may be limited, the delay in notifying complainants beyond a specified statutory timeline is unsatisfactory. It gives the impression of PCPD disregarding legal requirements and being inefficient in administration as well as inconsiderate in service delivery.

5. The situation should be redressed. PCPD was taking steps in the right direction. We urged CMAB to expedite the legal amendments proposed by PCPD. Until section 39(3) is amended, PCPD should step up efforts in monitoring progress of cases and strive to comply with the 45-day rule.

## Transport Department ("TD")

**Case No. OMB/DI/193**
**Arrangements for Driving Test Routes**
**(Assessment commenced on 10 December 2008 and completed on 17 February 2009)**



## Background

In response to allegations that TD favoured candidates from a driving school by assigning them an easier test route, The Ombudsman decided to inquire into the operation of the system for road test.

## Observations

2. Driving Test Examiners are authorised to choose one out of two to four pre-designated test routes of each driving test centre. TD has no guidelines on this.

3. In 2007, one of the test centres for the candidates in question offered three routes for road test. According to statistics specially compiled, the utilisation rates of the three routes in 2007 were 84.4%, 15% and 0.6%, with the pass rates 66.6%, 44.2% and 52.5% respectively. In comparison, the pass rate of other candidates for the whole of Hong Kong in 2007 was around 70%.

4. TD plans to computerise records on the utilisation rates of test routes and candidates' pass rates by the end of 2009 to monitor and review the test routes more effectively.

## Comments and Conclusion

5. There is no evidence of TD offering the candidates in question an easier test route as the overall pass rate of other candidates was comparable to theirs. However, the fact that one route of the test centre

studied has been favoured by most Examiners is clearly contrary to TD's intention in providing multiple test routes.

6. The Ombudsman urges TD to computerise statistical records of test routes soonest possible and regularly analyse the data. The Department should then decide whether guidelines should be drawn up for Examiners to select test routes more evenly. Meanwhile, TD should manually keep data on each driving test route for the purpose.

7. As TD has accepted the suggestion, The Ombudsman considers a full-fledged direct investigation unnecessary.